

WISHA Interim Operations Memorandum
Washington Department of Labor and Industries
#97-7-A
ORDERS OF IMMEDIATE RESTRAINT

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Background

In conducting inspections or performing other duties related to Title 49.17 RCW (the Washington Industrial Safety and Health Act), staff of the Department of Labor and Industries (L&I) may encounter hazards requiring immediate correction. RCW 49.17.130 authorizes orders of immediate restraint when "a danger exists from which there is a substantial probability that death or serious physical harms could result to any employee." RCW 49.17.130(3) further provides that the department may enforce the order through application to the superior court "for a temporary restraining order or such other relief as appears to be appropriate under the circumstances."

Although both the WISHA Compliance Manual (III-F) and the WISHA Consultation Manual (VI-E) provide guidance regarding the use of such orders, there have been requests for clarification of certain issues, including the appropriate process for handling employer requests for review and the process for pursuing a temporary restraining order (TRO). This interim memo provides that clarification and guides WISHA staff in the appropriate use of orders of immediate restraint (and red tags).

Policy

1. Subject to the applicable guidance in the WISHA Compliance and Consultation Manuals, WISHA staff are authorized to issue orders of immediate restraint (OIRs) when necessary to ensure that an imminent danger is corrected. When machinery is involved, a "red tag" should be issued.
 - a. The WISHA Compliance Manual addresses the question of the "elimination of the imminent danger" by noting that the employer's voluntary and *permanent* elimination of a hazard makes the OIR unnecessary (III-F.3.c(1)). Temporary actions, such as removal of the employees from the situation, clearly do not constitute permanent elimination of the hazard.
 - b. The WISHA Compliance Manual further addresses under what circumstances an inspector may choose to consider the employer's *temporary* elimination of the imminent danger as sufficient to avoid an OIR (III-F.3.c(2)). However, if the inspector has any doubt as to whether the removal of employees from an imminent danger situation will be permanent, he or she should issue an OIR.

2. While an employer's demonstrated cooperation may have an impact on the decision whether to issue an OIR, WISHA's primary consideration in determining whether an OIR should be issued is the immediacy and severity of the hazard. When a severe hazard is relatively unlikely to result in injury in the immediate future, such a hazard is not reasonably "imminent" and the CSHO or consultant should employ mechanisms other than an OIR to address it. Under these circumstances, the employer's level of cooperation or non-cooperation should not be a factor in determining whether to issue an OIR.
3. OIRs should be written as narrowly as possible to avoid affecting operations not related to the imminent danger in question. When practical, the OIR should state the conditions under which work can resume even before the inspector has returned to lift the OIR.

For example, an inspector who had a difficult time convincing an employer to remove employees from a steep roof in wet and windy weather may choose to address that "imminent danger" by writing an OIR. Rather than writing an OIR stating that "employees must not work on the roof" in response to an imminent danger situation, the inspector could write that "employees must not work on the roof without fall protection as required by WAC 296-155, Part C-1."

4. As with any administrative action by a state agency, OIRs may be challenged by the employer even if the department does not seek a TRO to enforce them.
 - a. If an employer indicates an interest in appealing an OIR, he or she should be notified of the informal option of discussing the issue with the CSHO Supervisor, in addition to the more formal processes described below.
 - b. If the employer wishes to use a more formal process (and regardless of whether an inspector or consultant issued the OIR), the Regional Compliance Manager (or designee) will conduct an administrative review. The Regional Compliance Manager (or designee) must be notified immediately and the employer must be given the opportunity to present his rationale for lifting the OIR to the Regional Compliance Manager (or designee) as rapidly as possible. After reviewing such information, as well as any information provided by the inspector, and after consulting with WISHA P&TS as appropriate, the Regional Compliance Manager must issue a written decision lifting the OIR, modifying the OIR, or leaving the OIR in place as originally issued.
 - c. Because they are not subject to the jurisdiction of the Board of Industrial Insurance Appeals, L&I decisions regarding OIRs can be appealed directly to Superior Court by the employer.

5. As indicated in the WISHA Compliance Manual, OIRs issued by compliance staff must be reported to the Regional Compliance Manager before a TRO is pursued (III-F.3.e). In addition, the Regional Compliance Manager must be notified whenever the OIR has the effect of discontinuing all or most of the operations at a particular job site (other than in residential construction). The Regional Compliance Manager, in turn, should make whatever additional contacts the situation requires (for example, notifying Public Affairs if there is likely to be media interest).

If the WISHA Compliance Supervisor chooses to pursue a TRO after notifying the Regional Compliance Manager, the following must be provided to the Office of the Attorney General (send via facsimile to (360)438-7485):

- a. Name, address and telephone number of the employer;
- b. Date(s) of inspection;
- c. A complete copy of any C&N issued (including C&N number and date issued);
- d. A complete copy of the OIR (including date issued and the name of the WISHA representative who issued it);
- e. County where the OIR was violated;
- f. Date and times when the OIR was violated;
- g. Person(s) who observed the violations and specific information regarding what each person observed and when;
- h. Description of the hazard and an explanation as to why it is a serious hazard;
- i. Indication as to whether the hazard has caused any serious injuries or fatalities in the past, and if so when they occurred;
- j. Indication as to how long the hazard has been in existence;
- k. Indication as to why the hazard is an "imminent hazard;"
- l. Specific description of required abatement;
- m. Indication as to whether the hazard is primarily mechanical (for example, a missing guard) or a question of process and/or training (for example, failure to use certified asbestos workers in an asbestos abatement project);
- n. Description of the likely economic impact on the employer that would result from the enforcement of the OIR.